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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Facilitate
Future Development of SMR Systems
in the 800 MHz Frequency Band

PR Docket No. 93-144
RM-8117, RM-8030
RM-8029

and

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding
800 MHz SMR

PP Docket No. 93-253

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FEDERAL COMMUNICATIONS COMMISSION
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JOINT REPLY COMMENTS
OF THE
INDUSTRIAL TELECOMMUNICATIONS ASSOCIATION, INC.
AND
THE ALLIANCE OF PRIVATE 800/900 MHz LICENSEES

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S U M M A R Y

The Industrial Telecommunications Association, Inc. (ITA) and the Alliance of Private 800/900 MHz Licensees (APEL) submit these Joint Reply Comments in the Federal Communications Commission's wide-area 800 MHz SMR proceeding. ITA/APEL urge the Commission to recognize that, regardless of the decision that the Commission reaches on the retuning issue, there will be direct and significant consequences for industrial entities. In this regard, the FCC must take affirmative action to preserve the availability of 800 MHz channels for industrial use. From the perspective of ITA/APEL, the Commission must guard against any attempts to use the Industrial/Land Transportation Pool channels to accommodate retuned SMR licensees.

ITA/APEL believe that the Commission is obligated, under the 1993 Budget Act, to take affirmative action to promote the development of wide-area, multi-channel SMR systems. As the comments in this proceeding have made clear, however, the effort to eliminate "regulatory anomalies" poses a formidable challenge. The difficulty arises because of the inherent limitations on the spectrum available for SMR use. Cellular and PCS carriers will have up to 40 megahertz of contiguous, exclusive use spectrum, whereas SMR licensees must contend, at present, with non-contiguous spectrum.

From the perspective of ITA/APEL, it appears necessary for the FCC to implement a retuning program that entails, in its final stages, some compulsory features. In doing so, however, the Commission must avoid the inherent unfairness of mandating retuning in a hasty or disorderly fashion. ITA/APEL are intrigued by the key elements of the compromise plan developed by AMTA. It represents one possible hope of reaching a realistic compromise between the parties who urge immediate mandatory retuning and those who oppose mandatory retuning in any form.

ITA/APEL strongly oppose any efforts to reallocate the General Category channels to the SMR service. These channels serve a vital role for traditional, internal use private radio systems and must be preserved for such use.

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To: The Commission

JOINT REPLY COMMENTS
OF THE
INDUSTRIAL TELECOMMUNICATIONS ASSOCIATION, INC.
AND
THE ALLIANCE OF PRIVATE 800/900 MHz LICENSEES

The Industrial Telecommunications Association, Inc. (ITA) and the Alliance of Private 800/900 MHz Licensees (APEL) hereby respectfully submit these Joint Reply Comments responsive to the various comments filed in this proceeding on January 5, 1995.

1. In their Joint Comments, ITA and APEL noted that the Commission's proposal in this proceeding raised some issues of critical importance regarding the spectrum rights and expectations of non-CMRS systems. ITA and APEL urged the Commission to recognize that there are legitimate and pressing requirements for

spectrum to accommodate the needs of private non-CMRS licensees.

2. Specifically, ITA/APEL expressed concern with those aspects of the proposal that would affect the continued availability of the radio spectrum in the 800 MHz band for independent, non-entrepreneurial radio systems operated by industrial, land transportation, business and public safety entities. ITA/APEL heartily endorsed the Commission's assessment that it was necessary to limit future SMR use of the 800 MHz General Category and Pool Channels.

REPLY COMMENTS

3. ITA/APEL recognize that, in the past three years, the nature of the SMR industry has changed dramatically. As the various comments make clear, the issues in this proceeding represent, to a large degree, a spirited contest between those parties who seek to preserve the rights and privileges of "local" Specialized Mobile Radio (SMR) systems and those parties who believe it is necessary to adopt measures to facilitate the development of wide-area SMR systems. More specifically, the essence of the public debate involves the issue of retuning local systems out of the upper block of SMR channels (channels 401-600) and whether retuning should be mandatory or voluntary.

4. Regardless of the decision that the Commission reaches on the retuning issue, there will be direct and significant

consequences for industrial entities. The Commission must take into account the fact that the conditions and parameters established with respect to retuning will necessarily affect the future availability of the 800 MHz band for trunked and conventional industrial systems. In these Reply Comments, ITA and APEL will outline the potential consequences of the retuning effort and offer what it hopes will be some helpful observations for the Commission's consideration.

5. Before addressing the specific points raised at the comment stage, ITA/APEL believe it is important to discuss, briefly, the origins of the SMR service and the impact of the 1993 legislative changes. In its original concept, the SMR service was designed to accommodate the dispatch requirements of industrial, land transportation, business and public safety entities using trunking technology. At that time, both the technology and the Commission's rules evidenced a preoccupation with traditional dispatch services as opposed to interconnected two-way radiotelephone service. As a number of parties have pointed out, however, the environment changed, irrevocably, when Congress adopted the regulatory parity provisions of the Omnibus Budget Reconciliation Act of 1993. This statute transformed the SMR systems, legally if not as a practical matter, into full-fledged competitors with cellular licensees.

Industrial/Land Transportation Channels

6. ITA/APEL believe it is important to reiterate, clearly and unambiguously, one of their fundamental concerns underlying this proceeding. Simply stated, the FCC must take affirmative action to preserve the availability of 800 MHz channels for industrial use. From the perspective of ITA/APEL, the Commission must guard against any attempts to use the Industrial/Land Transportation Pool channels to accommodate retuned SMR licensees.

7. ITA/APEL recognize that the Commission's primary focus in this proceeding is to adopt rules that will facilitate the development of wide-area, multi-channel SMR systems. In doing so, however, the Commission must remain cognizant of the critical nature of privately operated industrial and land transportation systems. Private, internal radio systems have become the predominant method by which industrial concerns dispatch their fleets of vehicles for maintenance, deliveries and emergency situations. These systems represent a vital tool used by industrial entities to ensure the safe and efficient conduct of their work-related activities.

8. In brief, private wireless telecommunications systems serve an essential role in a vast range of industrial and land transportation activities. Time and again, the Commission has

recognized this vital role. In 1959, for example, the Commission noted,

[i]n many cases, the operation of the private users is such that it is not convenient or practicable for common carriers to provide such service (e.g., remote or isolated business operations).¹

On another occasion, the Commission has stated that

[i]n view of the variety of needs and the required flexibility in system design, structured, tariffed, regulated common carrier systems would be wholly ineffective in meeting these specialized requirements of land mobile users.²

9. ITA/APEL believe it is also important to point out that the spectrum available to industrial and land transportation entities has decreased significantly since the Commission first allocated the 800 MHz band for private use. As has been documented by various commenters, when the Commission initially allocated channels 401-600 for trunked private radio systems, the channels were available equally for both commercial and internal communications systems.

10. In 1982, in action in Docket No. 79-191, the Commission allocated 80 channel pairs for SMR use, 70 channel pairs for public

¹ In re Allocation of Frequencies in the Bands Above 890 Mc., Report and Order, Docket No. 11866, 27 F.C.C. 359, 413 (1959).

² In re Amendment of the Commission's Rules Relative to Operations in the Land Mobile Service Between 806-960 MHz, Memorandum Opinion and Order, Docket No. 18262, 51 F.C.C.2d 945, 966 (1975).

safety use, 50 channel pairs for industrial and land transportation systems and 50 channel pairs for business systems. These channels were in addition to the 200 channel pairs allocated previously for trunked operations. Therefore, by 1982, industrial and land transportation eligibles requiring trunked systems could access, on a primary (non-intercategory sharing) basis, either the 200 channel pairs in the range 401-600, the 50 channel pairs allocated to the industrial/land transportation pool, or the 50 channel pairs allocated to the business pool. So, of the 450 channel pairs at 800 MHz that were designed to accommodate trunked systems, industrial and land transportation eligibles had access to 300 channel pairs (67% of the 450 channel pairs).

11. This situation changed dramatically in 1988 when the Commission designated the channels 401-600 for trunked SMR systems.³ As a consequence of that decision, industrial/land transportation entities could access, on a primary basis, only the 50 channel pairs in the industrial/land transportation pool and the 50 channel pairs in the business pool. Accordingly, industrial/land transportation entities were restricted to 100 of the 450 channel pairs available for trunked systems, or 22% of the 450 channel pairs.

³ In re Amendment of Part 90, Subparts M and S of the Commission's Rules, Report and Order, PR Docket No. 86-404, 3 FCC Rcd. 1838 (1988).

Public Safety Pool Channels

12. Nextel maintains that, in designing a new SMR regulatory structure, "[t]he Commission must take into account existing licensing on all 530 channels" in the 800 MHz band.⁴ Nextel would therefore have the Commission examine the 280 SMR category channels and the 150 General Category channels as well as the 50 Industrial/Land Transportation channels and the 50 Business pool channels. In recognition of the fact that the 70 Public Safety channels are not suited for SMR use, Nextel excludes these channels from its analysis.

13. ITA/APEL urge the Commission to take Nextel's analysis one step further. ITA/APEL agree with Nextel that the Commission, when examining the options for implementing regulatory symmetry, should preserve the existing prohibition on SMR use of the Public Safety channels. Nonetheless, it is imperative that the Commission develop a comprehensive solution that will promote efficient use of all 600 channels, including the Public Safety pool frequencies. Regardless of the ultimate resolution of the issues in this proceeding, industrial and land transportation licensees will have a continuing need to establish purely private systems to accommodate their internal communications requirements. In many areas, the existing pool of 50 Industrial/Land Transportation channels is inadequate to satisfy the present demand for channels.

⁴ Nextel Comments, page 6.

14. Accordingly, in the current environment, ITA/APEL do not believe it is appropriate to adopt any measures that would frustrate efficient use, for traditional private radio systems, of the existing Industrial/Land Transportation, Business and Public Safety pool frequencies. ITA/APEL believes that the current intercategory sharing rule set forth in Section 90.621(e)(1) has promoted efficient spectrum use. ITA/APEL recognizes that, as noted in APCO's comments, "APCO has long opposed intercategory sharing of Public Safety Pool channels."⁵ Though sympathetic to APCO's concern regarding SMR use of the General Category channels, ITA/APEL do not believe it is appropriate to restrict intercategory access to Public Safety channels by industrial and land transportation eligibles. Accordingly, ITA/APEL would strongly oppose any such initiative by APCO.

Regulatory Parity Considerations

15. Clearly, the Commission must take affirmative action to promote the development of wide-area, multi-channel SMR systems. Simply stated, the 1993 congressional mandate requires the FCC to implement regulatory symmetry. As Nextel interprets this mandate, the Commission must revise the applicable rules to enable CMRS service providers to compete on the basis of service characteristics, quality and price, rather than advantages created

⁵ APCO Comments, page 4.

by regulatory anomalies.⁶ On this point, ITA/APEL are in complete agreement. Systems that were previously private in character are now, by statutory definition, the regulatory equivalent of common carrier systems. Accordingly, the Commission is obligated, to the extent possible, to eliminate regulatory anomalies.

16. As the various comments make clear, the effort to eliminate regulatory anomalies poses a formidable challenge. The difficulty arises because of the inherent limitations on the spectrum available for SMR use. Cellular and PCS carriers will have up to 40 megahertz of contiguous, exclusive use spectrum, whereas SMR licensees must contend, at present, with non-contiguous spectrum. Motorola points out in its comments that, considered strictly from a technological perspective, the lack of contiguous spectrum for SMR use may no longer be a monumental impediment.⁷ Nonetheless, the availability of contiguous spectrum will clearly permit SMR licensees to enjoy greater flexibility in system design and operation. Equally important, ITA/APEL believe that the availability of contiguous spectrum for SMR use is part and parcel of the statutory mandate in favor of regulatory symmetry.

Retuning

17. The difficulty facing the Commission is that it must

⁶ Nextel Comments, page 2.

⁷ Motorola Comments, page 4.

implement the statutory mandate in an environment that, from the perspective of frequency availability and established use, is largely hostile to the concept of regulatory parity. The Commission's dilemma is that it must accommodate the regulatory symmetry requirements of wide-area SMR licensees but, as Motorola notes, not at the expense of incumbent licensees. ITA/APEL agree with, and endorses, Motorola's view that "[a]n orderly, fair and comprehensive transition plan is of the utmost importance.... [T]he FCC must ensure that incumbents will not be harmed by implementation of auctioned wide-area SMR systems."⁸ Nonetheless, unless the Commission finds a way to remedy what Nextel terms the "patchwork nature" of past 800 MHz licensing, the statutory vision of regulatory parity will be jeopardized.

18. ITA/APEL is not persuaded that any of the retuning models set forth in the various comments really present, in all facets, an "orderly, fair and comprehensive transition plan." In the view of ITA/APEL, any transition plan that relies entirely on voluntary retuning will likely be flawed because of the potential for incumbent licensees to resist the overtures of wide-area licensees. Similarly, any transition plan that seeks to implement mandatory retuning in a hasty fashion will be disorderly in its implementation and unfair to incumbents.

19. Moreover, the Commission must recognize that it is simply

⁸ Motorola Comments, page 8.

not possible to clear a "relocation block" of sufficient size to ease the transition process. As virtually all of the commenters recognize, the 800 MHz spectrum is heavily used in all of the major urban areas and in many rural areas, both for SMR as well as traditional private systems. There is no ready supply of vacant frequencies in any areas of the country that would prove useful as a relocation block. Consequently, if the FCC were to attempt to create a relocation block, it would invariably have to reallocate channels that are vital to the public safety and public service communications of licensees in non-SMR services. Any effort to create a relocation block would, therefore, lead to what SMR WON terms a relocation "domino effect."⁹ ITA/APEL agree with SMR WON that "[r]olling disruptions to multiple services were not anticipated by Congress."¹⁰

20. Nonetheless, the Commission must take positive action to address the current inequities between cellular providers and wide-area SMR licensees. Failure to do so would be an affront to the Omnibus Budget Reconciliation Act of 1993 because, as Motorola notes, cellular carriers enjoy a distinct spectrum capacity advantage and a headstart advantage over wide-area SMRs. Clearly, Congress has given to the Commission the mission of eliminating any such competitive advantages, not to prolonging them.

⁹ SMR WON Comments, page 44.

¹⁰ SMR WON Comments, page 45.

21. From the perspective of ITA/APEL, therefore, the FCC must take positive action to provide a more hospitable environment for wide-area SMR systems. Moreover, ITA/APEL conclude, with some reluctance, that voluntary retuning provisions will not be sufficient to comply with the congressional intent underlying the 1993 Budget Act. It appears necessary for the FCC to implement a retuning program that entails, in its final stages, some compulsory features. In doing so, however, the Commission must avoid the inherent unfairness of mandating retuning in a hasty or disorderly fashion. Similarly, the Commission must avoid implementing any retuning program that is premised on a discrete relocation pool, since the effort to create such a pool would necessarily be futile.

22. In this regard, ITA/APEL have reviewed the most prominent points of the "compromise" plan developed by AMTA. ITA/APEL understand that this plan will be formally submitted for the Commission's consideration as part of AMTA's reply comments. ITA/APEL are intrigued by the key elements of the plan. It represents perhaps the only hope of reaching a realistic compromise between the parties who urge immediate mandatory retuning and those who oppose mandatory retuning in any form. Even with proposals such as the AMTA compromise plan, however, the FCC would have to incorporate abundant safeguards to protect incumbent licensees.

General Category Channels

23. Various proponents of wide-area systems ask the Commission to cease licensing non-SMR systems on the General Category channels. ITA/APEL strongly oppose such a result. ITA/APEL recognize the important role of SMR systems in the overall telecommunications infrastructure. However, the effort to reallocate the General Category channels for SMR use assumes that the needs of SMR licensees should take precedence over the spectrum requirements of traditional private radio licensees. Long ago, the Commission affirmed the importance of radio services which are necessary for the safety of life and property.¹¹ In the intervening years, the Commission, Congress and the courts have continually affirmed this view.

24. Reallocation of the General Category channels for SMR use would elevate the needs of the SMR service above those of traditional private radio licensees. Such a result is neither necessary nor in the public interest. Any effort to deny industrial and land transportation entities the use of General Category channels would jeopardize the "many important and essential uses of private land mobile radio affecting public safety and the welfare, as well as the economy."¹²

¹¹ See In re General Mobile Radio Service, Report and Order, Docket No. 8658, 13 F.C.C. 1190, 1193 (1949).

¹² H.R. CONF. REP. No. 765, 97th Cong., 2nd Sess., at 20-21 (1982), reprinted in 1982 U.S.C.C.A.N. 2237, 2265.

25. In some urban markets, a significant percentage of the General Category channels are licensed to trunked SMR systems. For example, in Los Angeles, 58 of the 150 General Category channels are devoted to trunked SMR use. In other markets, however, the General Category channels are used heavily for non-SMR or non-trunked services. In New York City, only 25 of the 150 General Category channels are licensed to trunked SMR systems. The remaining 125 General Category channels are used for more traditional private radio systems. Moreover, in some markets, the use of the General Category channels by trunked SMR systems is negligible. In Boise, Idaho, for example, none of the 150 General Category channels are licensed to trunked SMR systems.

26. The above-referenced licensing data suggests that the use of, and demand for, General Category channels by trunked SMR licensees varies widely among different areas. The statistics also document that trunked SMR licensees are not alone in their desire to use the General Category channels. Clearly, the licensees of non-SMR and non-trunked systems have a need to use the General Category channels to satisfy their communications requirements. For these reasons, ITA/APEL strongly oppose any effort to reallocate the General Category channels to the SMR service.

WHEREFORE, THE PREMISES CONSIDERED, the Industrial Telecommunications Association, Inc. and the Alliance of Private 800/900 MHz Licensees respectfully submit these Reply Comments and urge the Federal Communications Commission to act in accordance with the views expressed herein.

**INDUSTRIAL TELECOMMUNICATIONS
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